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IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 97

United States of America, *Appellant*

v.

Ben Kapp, et al.

Appeal from the District Court of the United States for the Western District of Oklahoma

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Criminal Appeals Act where the lower Court upon a charge of conspiracy under Sec. 37 Cr. C, by making false representations in violation of Sec. 35 Cr. C., has failed to construe Sec. 37, the conspiracy Statute on which the indictment was founded, but, if it has construed any Statute at all, has construed Sec. 35 Cr. C., relating to false claims.

2. Whether the Court below has construed any Statute at all or only the indictment.

3. Whether, the Court below having held that the facts charged in the indictment do not involve a pecuniary fraud

under a Statute held by this Court to require one, does an alleged misrepresentation as to a matter beyond the control of Congress relate to a material matter?

OUTLINE OF ARGUMENT

This Court's jurisdiction to review a decision sustaining a demurrer being limited to a case wherein such a decision was "based upon the construction of the statute upon which the indictment was *founded*," (Criminal Appeals Act, 18 U. S. C. A. Sec. 682), this Court has no jurisdiction where the case below involved a conspiracy under Sec. 37 to violate Sec. 35 by making false representations and where the decision below, if it construed any statute at all did not construe Section 37, on which the indictment was founded, but Sec. 35, relating to false claims.

The Court below in holding that the facts charged do not involve a pecuniary fraud under a statute held by this Court to require one and that hence an alleged misrepresentation as to a matter beyond the control of Congress did not relate to a material matter, has construed the indictment, not the statute. Whether the Court below was right or wrong its decision that the indictment charged no pecuniary fraud is binding on this Court. The frequently expressed statement that where the District Court has held that the acts charged did not fall within the condemnation of the statute, the Court necessarily construed the statute is true only of those cases wherein there is some dispute as to the meaning or scope of the statute, as for instance where there is an attempt to apply it to a new state of facts. Where, as in the present case, there is no dispute that section 35, the False Claims Statute, requires a monetary fraud (this Court having settled the point) the Court below has simply held that the facts alleged in the indictment state no element of monetary fraud and this construes the indictment, not the statute.

Assuming this Court has jurisdiction, the question presented is not the broad question of the quasi-validity of governmental actions under an unconstitutional statute but the narrow inquiry as to whether, when the Court below has found that the indictment does not charge a monetary fraud under a statute which this Court has held requires one, a misrepresentation as to the origin of the hogs sold the government is a material misrepresentation. The Court below having held that there was no element of pecuniary fraud alleged in the indictment, it necessarily follows that any misstatement as to the origin of the hogs did not relate to a material matter.

I

If any Statute at all was Construed below it was not the Statute on Which the Indictment was Founded (Section 37 CR. C.) but the Claims Statute (Section 35 CR. C.)

This Court's jurisdiction under the Criminal Appeals Act is limited to the review of a decision "sustaining a demurrer to any indictment, * * * where such decision is based upon the * * * construction of the statute upon which the indictment is founded." (18 U. S. C. A. Section 682). The indictment herein charges a conspiracy under Section 37 of the Criminal Code (18 U. S. C. A. Section 88) to violate Section 35 of the Criminal Code (18 U. S. C. A. Section 80), the False Claims Statute (R. 7, 19). An examination of the Government's brief shows that it makes no contention that Section 37, the general conspiracy statute, was misconstrued, its argument being devoted to a demonstration that Section 35 of the Criminal Code, the False Claims Statute, has been misconstrued (Government's brief, pages 7, 9).

We do not believe this brings the case within the statute. The Criminal Appeals statute requires a construction of the statute "upon which the indictment is founded." The in-

dictment herein is founded not upon Section 35 but upon Section 37. The proof of this is that if the defendants were convicted they could only be given the sentence provided for under Section 37, a maximum of two years and a $10,000 fine instead of the sentence provided for under Section 35, a maximum of ten years and a $10,000 fine.

This Court has held that the Criminal Appeals Act is "an innovation in criminal jurisdiction in certain classes of prosecutions, which cannot be extended beyond its terms" (*U. S.* v. *Dickinson*, 213 U. S. 92). Following this norm of construction this Court has consistently refused to extend the scope of review provided for in the Act holding that an appeal does not open the entire case for review (*U. S.* v. *Keitel*, 211 U. S. 370, 398; *U. S.* v. *Hastings*, 296 U. S. 188, 192); that no appeal lies where the decision of the District Court is based upon an independent non-appealable ground (*U. S.* v. *Hastings*, 296 U. S. 188, 192-194); and that where the grounds of the ruling below are ambiguous the doubt will be resolved against this Court's jurisdiction (*U. S.* v. *Carter*, 231 U. S. 492-494; see also *U. S.* v. *Halsey, Stuart & Co.*, 296 U. S. 451). In the face of these decisions it seems a clear extension of the Act to construe it to apply to a decision wherein the Court construes not the statute on which the indictment is founded (here the conspiracy statute) but another statute entirely.

It is a matter of some wonder to counsel herein that this question seems never to have been raised. Counsel have examined what we believe to be all of the reported cases coming to this court under the Criminal Appeals Act and have found no case wherein this Court has specifically passed on the present question or wherein it has even been raised by counsel. It is true that this Court has passed upon cases arising under the Criminal Appeals Act which were almost identical with the present case, wherein upon a charge of conspiracy under Section 37, this Court has construed a secondary statute which the defendant is al-

leged to have conspired to violate.[1] Still this practice though acquiesced in over a period of time is not authoritative if there is a clear lack of a statutory grant of power. A crime being denounced by the statute which creates it and by no other (*U. S.* v. *Scharton* 285 U. S. 518), an indictment would seem to be "founded" upon the statute creating the crime and no other. And if this statute is not construed it would seem an end of the matter.

II

The Court Below Has Construed the Indictment, Not the Statute

Aside from Point 1, we do not believe that the Court below has construed a statute, either Section 37 or Section 35. Inasmuch as under *U. S.* v. *Cohn*, 270 U. S. 339, 345-346, a conspiracy to violate Section 35 of the Cr. Code must in-

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[1] These cases are:

U. S. v. *Bowman*, 260 U. S. 94;
U. S. v. *Walter*, 263 U. S. 15, both involving Sec. 35 Cr. C., the False Claims Statute;
U. S. v. *Stevenson*, 215 U. S. 200 (Immigration Laws);
U. S. v. *Biggs*, 211 U. S. 507 (Timber and Stone act);
U. S. v. *Keitel*, 211 U. S. 370; *U. S.* v. *Munday*, 222 U. S. 175; *U. S.* v. *Forrester*, 211 U. S. 399, and *U. S.* v. *Herr*, 211 U. S. 406 (all involving Land Entry Laws);
U. S. v. *Holte*, 236 U. S. 140 (the White Slave Act);
U. S. v. *Morehead*, 243 U. S. 607 (Homestead law);
U. S. v. *Hutto*, 256 U. S. 524 (Homestead law);
U. S. v. *Janowitz*, 257 U. S. 42 (violating section 148 of the Cr. code relating to fraudulent alterations of United States obligations);
U. S. v. *Davis*, 231 U. S. 183 (involving conspiracy to violate sections 28 and 29 of the Penal Code pertaining to the making of false affidavits);
U. S. v. *Ferger*, 250 U. S. 207 (Forgery of Bill of Lading);
U. S. v. *Foster*, 233 U. S. 515 (Conspiracy to defraud or to violate Postal Laws);
U. S. v. *New South Farm and H. Company*, 241 U. S. 64 (Conspiracy to violate Mail Fraud Statute).

The cases involving conspiracies to violate the Anti-Trust laws are not in point since those laws have their own conspiracy provisions. Thus, *U. S.* v. *Patten*, 226 U. S. 525; *U. S.* v. *Pacific & Arctic R. and Nav. Co.*, 228 U. S. 87, and *U. S.* v. *Winslow*, 227 U. S. 208 do not silently support the contention that construction of an auxiliary statute can be the basis of jurisdiction.

volve a pecuniary fraud (defrauding the Government as to its governmental functions as in *Haas* v. *Henkel*, 216 U. S. 462, 479, being insufficient) the alleged misrepresentation must relate to a material fact tied up with a possible monetary loss to the government. The Court below has simply held, rightly or wrongfully, that there was no such possible monetary loss under the facts alleged in the indictment, and as that court's construction of the indictment is binding on this Court[1] no question of the construction of a statute is here for review.

Obviously, there has been no construction of Section 37, the general conspiracy statute, or even of Section 35, the claims statute, in any real sense of the word, in holding that under the facts stated in the indictment there was no possibility of a pecuniary loss to the government. It is as if in a first degree murder indictment the words "with malice aforethought" were omitted. Quashing such an indictment would not construe a statute denouncing murder because the inquiry would not be what the statute denounced, but whether, without the claim of premeditation and malice aforethought the facts alleged in the indictment amounted to murder. In the same way, the present inquiry is not as to what the False Claims statute means; this Court has already decided what it means in *U. S.* v. *Cohn, supra;* it means that a financial fraud must be involved. That meaning the court below has taken directly from this Court and has simply held that the facts alleged in the indictment show no possibility of pecuniary loss to the government. The lower court has added nothing to nor subtracted anything from this Court's construction of Section 35; the meaning of that section is the same now as it was prior to the decision below. It could have arrived at its decision without even reading Section 35 once it concluded from this

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[1] See *U. S.* v. *Hastings*, 296 U. S. 191, 192; *U. S.* v. *Yuginovich*, 256 U. S. 450, 461; *U. S.* v. *Colgate & Co.*, 250 U. S. 300; *U. S.* v. *Davis*, 231 U. S. 183.

Court's decision in *U. S.* v. *Cohn*, supra, that Section 35 involved a pecuniary loss alone.

We are aware of statements in some of this Court's decisions that where the district court has held that the acts charged do not fall within the condemnation of the statute the court below has necessarily construed the statute and the appeal lies. (See *U. S.* v. *Patten*, 226 U. S. 525, 535; *U. S.* v. *Birdsall*, 233 U. S. 223, 230; *U. S.* v. *Nixon*, 235 U. S. 231, 236; *U. S.* v. *Mosley*, 238 U. S. 383; *U. S.* v. *Cohn*, 270 U. S. 339, 342-343). Thus in *U. S.* v. *Patten*, supra, a broad statement appears that "it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon the construction of it." (*U. S.* v. *Patten*, 226 U. S. 534, 535.) But this broad statement like other broad statements must be restricted to the facts in that particular case. The court laid before itself on the one hand the facts alleged in the indictment (a Sherman Act case), and on the other the statute. The question was whether the statute denounced the particular acts charged, i.e., whether the statute included them or not. The inquiry was as to the meaning of the statute, how far it went, whether it applied to the particular acts charged. Necessarily, the construction of the statute was involved. So, too, in *U. S.* v. *Birdsall*, 233 U. S. 223-230, this Court said:

> "As the District Court held that the acts charged did not fall within the condemnation of the statute, the Court necessarily construed the statute, and the cases are properly here."

In that case the defendant was charged with having given bribes to two Government Indian Agents to get them to advise a United States Judge as to a reduction of a sentence. As the indictment alleged that the money was given with intent to influence their "official" action, the question was whether the action to be influenced was an "official" action within the meaning of the bribery statute. This required

an examination of the bribery statute to ascertain whether under it an "official" action must be prescribed by statute or whether it was sufficient if it was governed by a lawful requirement of the executive department of the government. The object, therefore, was the ascertainment of the meaning of the statute, not, as in the present case, whether certain facts amounted to a violation of a statute whose meaning had already been ascertained.

In *U. S.* v. *Nixon*, 235 U. S. 231, a receiver of a common carrier was indicted for shipping livestock from a quarantine state to another. A statute of 1905 prohibited such transportation by a railroad company. As a receiver was not a railroad company the court, applying the 1905 Act, quashed the indictment on this ground. However, it turned out later that the Act of March 4, 1913 made the provisions of the 1905 Act apply not merely to railroads but to all common carriers, which this Court held included the Receiver of a railroad. In passing upon the criminal appeal this Court held that a statute upon which an indictment is founded may be construed not only by misinterpreting its language but by overlooking its existence and failing to apply its provisions to an indictment which sets out facts constituting a violation of its terms (page 235-236). This Court said:

> "When he sustained the demurrer on the ground that the shipment therein stated did not constitute a crime of which the receivers could be convicted, he in legal effect held that they were not liable to prosecution if, while operating a road as common carriers, they hauled livestock from a quarantine state to another. In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act" (page 236).

Again, we say that the inquiry was as to the meaning of the 1913 amendment to the 1905 statute, i.e., whether "com-

mon carrier" in the 1913 amendment included the receiver of a railroad. In this way there was a clear construction of the statute.

In *U. S.* v. *Mosley*, 238 U. S. 383, 385, this Court stated:

> "The demurrer was sustained by the District Court on the ground that the section did not apply to the acts alleged. As the judgment on the face of it turned upon the construction on the statute, the United States brought the case to this Court." (page 385)

The four counts of the indictment alleged a conspiracy to injure and oppress voters in an election for a Member of Congress in violation of Section 19 of the Cr. Code. To that end the defendants agreed to omit the precinct returns from their count and from their returns to the State Election Board. The decision shows that the question was whether the repeal of the Act of February 8, 1894, by implication withdrew offenses committed by election officers from the scope of Section 19 of the Cr. Code. A clear case of the construction of Section 19 was therefore involved.

In *U. S.* v. *Cohn*, 270 U. S. 339, the defendant was indicted for a violation of Section 35 of the Cr. Code, the False Claims Statute, discussed herein. The indictment was dismissed below on the ground that the statute did not make the matters charged a crime against the United States (page 342). The indictment charged that the defendant caused false and fraudulent statements to be made with reference to a shipment of cigars from the Philippine Islands. The decision of this Court turned upon the construction of the words "claim upon or against" the Government within the meaning of the statute, i.e., as to whether obtaining the possession of non-dutiable merchandise was obtaining the approval of a claim within the meaning of the statute. This Court construing Section 35 of the Cr. Code held that obtaining the approval of a "claim upon or against" the Government related solely to the approval of

a claim for money and did not relate to the entry and delivery of non-dutiable merchandise. This was manifestly a construction of the statute.

We think, therefore, that statements by this Court in the various decisions above cited that a holding that the indictment does not state facts within the condemnation of the statute necessarily involves a construction of the statute must be restricted to the particular cases involved in which, in every instance, it will be found the statute was actually construed upon a dispute as to its meaning. The real inquiry in these cases was exactly the converse of whether the acts charged came within an already ascertained statute; it was whether the statute, attempted to be applied to a new state of facts, covered the acts charged. This necessarily involved a construction of the statute. In the present case there was no dispute below as to the meaning of the statute, the court below having followed this Court's decision in *U. S.* v. *Cohn*, supra, that Section 35 must involve a pecuniary fraud and did not condemn a non-pecuniary fraud. The court below has simply held that if any fraud was alleged in the indictment it was non-pecuniary in character and therefore not within the scope of the statute. If there had been any dispute below revealed by the court's decision to the effect that Section 35 denounced a non-pecuniary fraud and a dispute here on this point, the construction of a statute might in fact be involved, but this is not the case. On the contrary, the meaning of the statute is conceded, both below and here, as to the necessity of a pecuniary fraud, and the only dispute is as to whether the facts alleged constitute a pecuniary fraud. This is not a construction of the statute.

That the lower court's decision was based upon its conclusion that, the AAA Act being unconstitutional, the facts alleged in the indictment involved no possibility of a pecuniary loss to the Government is clear from an analysis of its decision. The alleged false representation is that the

hogs were the hogs of various producers when in fact they were the defandants' (p. 20). The court said:

> "There is no contention that the hogs were not shipped and that the bills * * * were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.
>
> "This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void." (R. 20)

Boiled down, this means that the Government got the right price but the wrong hogs. But if it could do nothing under the AAA Act, even with the *right* hogs, it has sustained no *pecuniary* loss in getting the wrong ones. There is nothing in the indictment alleging the Government paid more than its own price for the hogs it got. Even assuming the phrase "premium prices" in the indictment (R. 9, 10, 11) (a bare conclusion discountenanced in *U. S.* v. *Cruickshank,* 92 U. S. 542) brings in the whole Agricultural Adjustment Act and all the Regulations, still we say there is no sufficient showing in the indictment that the Government paid more for the hogs than the market price. In any event this must have been the view of the court below and if so the question is not open here, the lower court's construction of the indictment being conclusive (*U. S.* v. *Hastings,* 296 U. S. 191, 192, and cases cited, supra).

It follows that the Court below, adopting this Court's own ruling in *U. S.* v. *Cohn,* supra, that Section 35 embraces pecuniary frauds only, has held that the indictment herein does not charge a pecuniary loss, or the possibility of it. Rightly or wrongly the court below has thus construed the indictment and not the statute and this Court has no jurisdiction under the Criminal Appeals Act.

III

Assuming the Jurisdiction, the Only Question Involved is Whether the Alleged Misrepresentation was as to A Material Matter, as to Which the Government's Authorities are Unconvincing.

Assuming that the court below has construed the statute within the meaning of the Criminal Appeals Act, the question here is not the broad question of the quasi-validity of Governmental Acts under an unconstitutional statute, but the narrow inquiry as to what is a misrepresentation of a material fact. Here again we are met with an obstacle when trying to find the construction of a statute for Section 35 says nothing about a material fact. The necessity that the misrepresentation denounced by Section 35 should refer to a material fact is not a requirement of Section 3 but of the general criminal law, which decrees, *in favorem libertatis,* that no man shall be imprisoned for a false representation unless it relates to a material fact. It requires, we think, a wider construction of the Criminal Appeals Act than allowable to construe its grant of power to a case wherein the inquiry is not the meaning of a statute but whether a requirement of the general criminal law that the misrepresented fact shall be material is met by the particular misrepresentations of the particular indictment.

But assuming that the inquiry is permissible, was the misrepresentation as to the source of the hogs the misrepresentation of a material fact? Certainly cases like *U. S.* v. *McDonald,* 10 Fed. Sup. 948, do not answer the inquiry. The offense there involved was not a conspiracy to make a false representation as to a material fact in violation of Section 35 Cr. C. but apparently a straight conspiracy to defraud under Section 37. The allegations of that particular indictment may have made out a good charge of fraud—we do not know, as we do not have the indictment before us. It may well be, as the Court says,

that those who conspire to sell hogs to the Government, falsely representing that they are entitled to the benefits of the Act, and who thus get money from the public treasury, have committed a crime. As the court says, because money cannot constitutionally be paid out to a favored class, it does not follow that others who falsely represent themselves as of that class, and thus enrich themselves at public expense, should go unpunished. We may admit all this, but how does this help us to determine whether a false representation as to the origin of the hogs, *under the allegations of the present indictment as that indictment has been construed below,* relates to a material matter when the legislative program based on the origin of the hogs is unconstitutional? The Court's decision in *U. S.* v. *McDonald,* supra, seems to deal with the question on the basis of the existence or non-existence of a legal crime or even a moral wrong, but even so it discusses the legal crime of a conspiracy to defraud under *Section 37,* not a conspiracy under Section 37 to make a false representation as to a material matter under *Section 35.*

Cases like *Madden* v. *U. S.,* 80 Fed. (2d) 672 and *U. S.* v. *Seelig and Mesch Company,* (S. D. N. Y. Appendix Gov. Brief) are not in point: the Government would always have a qualified title to moneys in its possession, no matter how it got them. *Langer* v. *U. S.,* 76 F. (2d) 817, 824-825 holds that upon a charge of conspiracy corruptly to administer the FERA and NRA Acts, the gist of the offense is the conspiracy. The Court held, without giving reasons, that it did not matter whether the Acts are unconstitutional or not. *U. S.* v. *Harding,* 81 F. (2d) 563, simply follows the *Langer* case, remarking, as in that case, that the claim of unconstitutionality of the Act as a defense was in the nature of a collateral attack. The Court said that the ultimate object of the conspiracy was to obtain moneys the defendants would not otherwise get except for their own unlawful acts and so if they received the moneys it could hardly be

contended their receipt was lawful, whether Congress had or had not the right to pass the Act. These decisions are poles apart from the narrow question herein: that the Court below having held that the facts charged in an indictment do not involve a pecuniary fraud under a statute which requires one, a misrepresentation as to a matter beyond the control of Congress was not material.

As to *U. S.* v. *Soeder*, 10 F. Supp. 944; 947, this case holds that upon an indictment under Section 37 for conspiracy to defraud, by misrepresenting the origin of hogs, defendants are estopped to deny the validity of regulations they pretended to observe. As this was a direct conspiracy under Section 37 no question of materiality of an alleged false representation was involved. As to *U. S.* v. *Schor*, 13 F. Supp. 399, the question there was whether "any matter within the jurisdiction of any department or agency of the United States," was involved, the false vouchers, the defendants claimed, being filed with the Triborough Bridge Authority. The case turned on this point alone.

We do not think any of the above cases are helpful. As we have said before the sole question here is whether the Court below having held that the facts charged in an indictment do not involve a pecuniary fraud under a statute held by this Court to require one, does an alleged misrepresentation as to a matter beyond the control of Congress relate to a material matter? We think clearly it cannot, that a material misrepresentation would have to relate to a possible financial loss and that as this has been foreclosed by the lower Court's construction of the indictment, this Court has no power to come to any different conclusion. In this light no question of estoppel can arise. The Court below having judicially noticed the unconstitutionality of the AAA statute one of the facts alleged to be part of the fraud vanished from the case and left, according to the Court below, only the allegations as to whether the hogs were shipped and the bills were correct. As the Court below held there were no

contrary claims in the indictment, the misrepresentations as to the origin of the hogs ceased to be material and the order sustaining the demurrer because the indictment alleged no element of pecuniary fraud necessarily followed.

CONCLUSION

The appeal herein should be dismissed or the judgment below affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 97.—October Term, 1937.

The United States of America, Appellant, *vs.* Ben Kapp, Bert Cox, Tom Woods, etc., et al.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[December 6, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case comes here under the Criminal Appeals Act. 18 U. S. C. 682.

The second count of an indictment charged appellees with conspiracy to defraud the United States by furnishing false information and making false statements to the Secretary of Agriculture in order to secure benefit payments under the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31; Criminal Code, secs. 35, 37; 18 U. S. C., secs. 80, 88. The District Court sustained a demurrer to this count and the Government appeals.

The contention of the Government is that the appellees conspired to cheat the United States by selling hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold and the continued ownership by such producers. Appellees' demurrer went upon the ground, among others, that the provisions of the statute and the regulations of the Secretary of Agriculture to which the count referred are void (*United States* v. *Butler*, 297 U. S. 1) and that the acts set forth in the indictment do not constitute an offense against the laws of the United States.

The false claims statute under which the prosecution was brought penalizes one who "for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States . . . shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false statements or representations" (Criminal Code, sec. 35). After referring to the statute, the District Judge said in his opinion:

"The overt acts charged, which would be material in this count, are that hogs were shipped under the representation by the de-

fendants that they were the hogs of various producers when in fact the hogs belonged to one or more of the defendants.

"There is no contention that the hogs were not shipped and that the bills, which were made to Armour and Company and other processors, were not correct bills, with the exception that the hogs did not originate from the sources represented by the defendants.

"This ceases to be a material fact, if the provisions of the Agricultural Adjustment Act are void. In other words, the representations, which are alleged to have been made, cease to be misrepresentations of material facts when the act itself falls".

1. Appellees contend that if any statute was construed, it was not the statute on which the indictment is founded and hence that this Court has no jurisdiction. The point is that the indictment charged a conspiracy under Criminal Code, section 37. But the conspiracy charged is one to violate the false claims statute, Criminal Code, section 35. In similar cases the jurisdiction of this Court has been sustained. The statute, at the violation of which the conspiracy is aimed, has been treated as the statute upon which the indictment is founded within the meaning of the Criminal Appeals Act. *United States* v. *Bowman*, 260 U. S. 94, 95; *United States* v. *Walter*, 263 U. S. 15, 16, 17. See, also, *United States* v. *Keitel*, 211 U. S. 370, 387.

2. Appellees contend that the court below construed the indictment and not the statute. *United States* v. *Colgate & Co.*, 250 U. S. 300, 306; *United States* v. *Hastings*, 296 U. S. 188, 192. The argument is that a conspiracy to violate section 35 must involve a pecuniary fraud. *United States* v. *Cohn*, 270 U. S. 339, 345, 346. In that view appellees urge that the court below has simply ruled that there was no pecuniary loss under the facts alleged. But the District Court found no flaw in the indictment as a pleading. Nor does the court appear to have considered the question of pecuniary loss. The court rested its decision upon the point that the facts alleged in the indictment with respect to the identity of the producers of the hogs, or the sources from which the hogs originated, had ceased to be material because of the unconstitutionality of the provisions of the Agricultural Adjustment Act. This did not purport to be a construction of the indictment but a ruling that the indictment in view of the invalidity of that Act failed to state an offense. The substance of the decision thus appears to be that the false claims statute does not apply to an attempt to defraud

the United States by obtaining the approval of claims and benefit payments through false representations, if the statute providing for such claims and payments is found to be invalid. That is clearly a construction of the statute. *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Birdsall*, 233 U. S. 223, 230.

3. Such a construction is inadmissible. It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. See *Madden* v. *United States*, 80 F. (2d) 672, 674. Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government. See *Langer* v. *United States*, 76 F. (2d) 817, 824, 825; *Madden* v. *United States, supra*; *United States* v. *Harding*, 81 F. (2d) 563, 568; *United States* v. *MacDonald*, 10 F. Supp. 948.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.